

Federal Amicus Intervention in Private Antitrust Litigation Raising Issues of Extraterritoriality: A Modest Proposal

The extraterritorial application of United States law has caused growing unease and criticism abroad in recent years. The most public and dramatic expressions of these concerns have been in the antitrust area. While this has been prompted by both government and private antitrust litigation, the latter has caused the greatest concern, in substantial part because of a belief that foreign interests are taken into account in the government's prosecutorial discretion but are likely to receive short shrift in private cases. It has been suggested that one remedial measure would be greater participation by the federal government in private antitrust suits which involve issues of antitrust jurisdiction over conduct abroad and foreign parties, particularly where foreign governmental policies and interests are implicated. This paper discusses the question of whether there is a need for a mechanism to identify cases raising such issues and to facilitate government intervention in such suits; and the further question of what steps might be appropriate.

A. The Rising Level of Foreign Concern

Foreign criticism of the reach of U.S. antitrust jurisdiction is not new. It accompanied some of the government's anti-cartel cases in the 1940s and 1950s. However, there has been an acute rise in the level of concern and friction in recent years. Sharp protests have been addressed to the U.S. government and legislation has been enacted in several countries to limit discovery and/or block or nullify enforcement of U.S. judgments reached

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as a result of what is thought to be a too expansive view of American antitrust jurisdiction.

This increased concern can be ascribed to a number of elements, but a salient factor has been the volume and impact of private antitrust litigation. This does not mean that the reach of government enforcement is accepted. But concern about it is tempered by the fact that many other industrial nations have their own antitrust programs, and that procedures for inter-governmental consultation have been developed that assure a level of consideration of foreign interests. No such procedures, of course, apply to private litigation; and private litigants have no incentive to moderate their claims or tactics because of foreign concerns. In the year ending June 30, 1980, 1,457 antitrust suits were filed, more than six times the number two decades earlier. Most of these are private suits and while, obviously, relatively few raise issues of extraterritoriality, some well-publicized cases have, notably the recent uranium litigation.

The prospect of taking account of foreign interests in private antitrust cases has been brought to the fore by *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1977) and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). For three decades the "effects" doctrine as enunciated in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) was largely accepted and left unelaborated. *Timberlane* and *Mannington Mills* have signalled reexamination of the exercise of antitrust jurisdiction in foreign commerce cases, bringing into the analysis a balancing process which includes considerations of comity and foreign interests. This subject is also under active consideration by the American Law Institute in its revision of the Restatement of Foreign Relations Law, the tentative draft of which proposes a balancing process as part of a standard of reasonableness to govern antitrust jurisdiction in extraterritorial situations.¹

The new approach is in its early stages and has not yet answered the concerns of foreign governments regarding the reach of the U.S. antitrust laws.² *Timberlane* and *Mannington Mills* may presage a flexible view of jurisdiction, including due weight to foreign governmental interests. But there has not yet been any case decided purely on the ground that antitrust jurisdiction should not be exercised because of the balance of interests.³

¹The ALI, Restatement of the Law, Foreign Relations Law of the United States (Revised), Tentative Draft No. 2, Introductory Note, pp. 87-95, Sections 402, 403, 415 (pp. 97-114, 131-142), March 27, 1981.

²Davis R. Robinson, the Legal Adviser to the Department of State, took note of the embryonic state of the law in testimony before the Senate Judiciary Committee, Dec. 3, 1981:

But while cases such as *Timberlane* and *Mannington Mills* represent a start, our law in this area is still relatively undeveloped. In my view, much remains to be done to articulate appropriate standards to guide the exercise of antitrust jurisdiction in this area.

³A recent Tenth Circuit opinion, following *Timberlane*, upheld a jury verdict for defendants, American companies accused of conspiring not to sell potash mined in Canada to a Canadian commodities trader. In upholding the verdict, the court stated that "[c]omity concerns outweigh any effect on United States commerce," thus making U.S. jurisdiction unwarranted, but

Indeed, the two cases might be interpreted as actually lowering the threshold jurisdiction requirement below *Alcoa*. In the uranium litigation, the balancing of interests aspect of the new approach was not confirmed. In the *Westinghouse* litigation, the Seventh Circuit stated that the balancing factors were not yet the law in its circuit and declined to apply them as a prerequisite to a default judgment against non-appearing foreign parties. Not only did the Court reject foreign governments' representations that the balancing process should precede entry of such a default judgment, but it responded with a highly offensive challenge to the integrity of those governments.⁴

The Antitrust Division has pointed to *Timberlane* and *Mannington Mills* as indicating that the courts will undertake a balancing process similar to that performed by the Division in its enforcement decisions; in its view, the resulting "jurisdictional rule of reason" should alleviate foreign concerns.⁵ Some foreign observers have responded that the Antitrust Division should accept responsibility for the realization of this goal — at the least, that it should participate in a systematic way in private antitrust cases to insist upon its adoption and proper implementation.⁶

It is likely that there will be occasions for such government involvement in private cases. Foreign trade is playing an increasing role in our economy. This means that conduct abroad will increasingly have effect in the United States, providing a possible basis for American antitrust jurisdiction. Foreign government intervention into economic matters will also continue, taking diverse forms, including policies inconsistent with a strict rule of competition. Furthermore, foreign nations will not accept a U.S.-centered view of the impact of foreign trade restraints or regulation. The expectation that the problems reflected in recent cases will recur reinforces the arguments for U.S. government participation on a regular basis in private antitrust litigation raising issues of extraterritoriality. Such participa-

also ruled that dismissal was justified because there were "insufficient contacts with and effects upon commerce within the United States to justify federal court jurisdiction." *Montreal Trading Co. v. Amax, Inc.*, 661 F.2d 864, 868-871 (10th Cir. 1981), *cert. denied*, March 8, 1982. Because of the lack of sufficient contacts, the comity finding does not seem essential to the court's result.

⁴*In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1255-56 (7th Cir. 1980) characterized the foreign governments as "surrogates" of the defaulting companies who "subserviently" presented the companies' arguments against jurisdiction. (For the U.S. government's reaction, see *infra* at note 9.) The district court in that case subsequently denied defendants' motions for summary judgment on comity grounds, stating that there were factual issues requiring trial and that comity was a matter of discretion, citing also the absence of U.S. government representations.

⁵See, e.g., Shenefield, *The Extra-Territorial Impact of U.S. Antitrust Laws: Causes and Consequences*, Remarks to the ABA Section on International Law, New York, August 9, 1978 at 20; Shenefield, *Extraterritoriality and Antitrust — New Variations on a Familiar Theme*, Remarks before the International Law Institute and the ABA International Law Section, Washington, D.C., December 10, 1980 at 7.

⁶E.g., Hermann, *Extraterritorial Application of National Laws Regulating Business Activities*, 7 DITCHLEY J. (No. 2) 14, 19-20, 22 (1980); see also Lowenfeld, *Sovereignty, Jurisdiction and Reasonableness: A Reply to A.V. Lowe*, 75 AM. J. INT'L L. 629, 631, n.12.

tion could both help assuage foreign concerns and help the courts move toward a consistent, unified and sensible doctrine regarding application of the antitrust laws to conduct and entities outside the United States.

B. The Present Status of Federal Governmental Intervention in Private Antitrust Litigation

There is at present no clear policy regarding federal government participation as *amicus curiae* or otherwise in private cases raising issues of jurisdiction over conduct and parties abroad and conflict with foreign governmental policy. Decisions on whether to participate as *amicus* in private cases at the appellate level are the responsibility of the Solicitor General's office. The Solicitor General's office may be invited by the Supreme Court to express its views, a request which usually is made at the petition stage. In addition, the Solicitor General's office regularly reviews private cases accepted by the Court to see if they raise issues in which there is sufficient governmental interest to participate. This involves consultation with the appropriate division within the Justice Department and with other interested agencies, who may also initiate such consideration. These procedures result in a considerable number of *amicus* briefs being filed at the Court by the Solicitor General's office every year, including about twenty briefs on the merits. Such *amicus* briefs have been filed frequently in private antitrust cases.

Government *amicus* appearances at lower appellate levels are also subject to the supervision of the Solicitor General, whose approval is required for such action by Justice Department divisions or other government entities (like the Cabinet Departments) which do not have independent litigating authority.⁷ Thus, the Antitrust Division would request the approval of the Solicitor General. If approval is granted, the Division itself is generally responsible for the *amicus* presentation, although in some instances the Solicitor General's office may remain involved to some extent. Recent *amicus* appearances in the courts of appeals have included private cases in which the government expressed views on issues of implied exemption from the antitrust laws.

At the trial court level, the divisions of the Justice Department have independent authority to decide on *amicus* participation. There have been very few such participations by the Antitrust Division. Thus, our informants recalled only one participation at the trial court level in a private antitrust case and that participation was as a party-intervenor at one stage of the lengthy *Thill Securities Co. v. New York Stock Exchange* litigation.⁸

⁷The authority of the Solicitor General in this area is provided for by 28 C.F.R. § 0.20 (1980).

⁸The Civil Division is responsible for *amicus* participation at the trial court level on sovereign immunity issues. Before the Foreign Sovereign Immunities Act, this was done fairly frequently, by filing suggestions of interest. The Division considered that the Act made the issue a matter of law so that foreign governments can properly appear and argue without interven-

In one recent famous case, *Int'l Ass'n of Machinists v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), the Division did not participate as *amicus* notwithstanding a specific request by the district judge.

No regularized procedure exists for bringing cases posing questions of the reach of U.S. jurisdiction abroad to the attention of either the Solicitor General's office, the Antitrust Division or any other federal governmental body. However, the lack of a formal procedure does not appear to have hindered federal participation. At the Supreme Court level, the Solicitor General's office feels that existing procedures work well and that no special rule is appropriate for the few cases raising such issues. In the lower courts as well, no special problem appears to have arisen due to the government's lack of awareness. Justice Department sources indicate that the foreign parties and their United States counsel in such cases know how to bring such issues to the attention of the appropriate United States government agencies, by representations to the State Department or other means.

The rarity of *amicus* participation by the Antitrust Division at the trial court level may be attributed to a number of factors, which also apply to cases involving extraterritoriality issues. The Division normally has incomplete information about the facts in private cases. Consequently, it would not be prepared to take a position on issues that require assessment of facts. This will be true of extraterritoriality and comity issues, at least with respect to the results of applying the principles of *Timberlane*, *Mannington Mills* and the Restatement to the facts of specific cases. The Division's reluctance to act without full inquiry in these cases is probably enhanced by a reluctance to take any position limiting antitrust jurisdiction. There also may be internal disagreement about the application of the balancing process in a particular case. Finally, there may be extrinsic factors, as in the *OPEC* case, where it was apparently considered simply unacceptable to appear on the side of OPEC regardless of the merits. Where the private parties are well represented, leaving them to litigate often appears sensible, especially in the trial court.

Yet on these extraterritoriality issues, if the Division is to provide helpful guidance, its expression of views should take place at the trial court level, indeed at an early stage of the proceeding. Even if the Division is not prepared to assess the relevant facts and to take a position on whether antitrust jurisdiction should be exercised in a particular case, it can urge the court to take account of factors which bear upon comity and the reasonableness of exercising jurisdiction. It should further urge the court to undertake its

tion or appearance of the U.S. government. Nevertheless, the Civil Division has continued to appear in some cases involving foreign governmental entities upon request of the State Department and the foreign government, *e.g.*, on whether the extent of contacts with the U.S. were sufficient to provide a basis for jurisdiction. In addition, the Division has appeared in several International Trade Commission cases to convey the concern of foreign governments, and in Iranian claims litigation to implement the hostage agreement.

decision on the exercise of antitrust jurisdiction as early as possible, recognizing that foreign government interests can be offended by undue deferral of the jurisdictional decision. And it can provide to the court authoritative assessments of factors within the nature of its knowledge, such as foreign government interests and the impact on U.S. foreign relations.

C. Possible Means of Encouraging Federal Participation in Private Antitrust Litigation Raising Questions of Extraterritoriality

We have considered a number of avenues which might alleviate foreign concern over private antitrust cases involving conduct and parties abroad and conflict with foreign governmental policy. These include a formal notification procedure, statutory provisions for intervention and/or expedited appeals, and policy statements by various governmental bodies indicating a readiness to intervene to address such issues.

1. A formal notification procedure could be modeled on 28 U.S.C. Section 2403(a) which requires courts to certify to the Attorney General any case wherein the "constitutionality of any Act of Congress affecting the public interest is drawn in question." But our inquiry does not suggest that a formal notification procedure would be useful or necessary. There seems little likelihood that private cases raising issues of extraterritoriality will not be addressed because they somehow slip through the cracks and are not noticed.

In addition, there would be serious problems in defining the circumstances in which notification would be called for. The fact that there are foreign parties, even foreign governmental parties, or that legal process will extend to foreign countries is not sufficient. Many such matters are routinely litigated. The Foreign Sovereign Immunities Act and the Convention on the Taking of Evidence Abroad reflect a preference for having such issues handled by courts in the normal course, rather than by diplomatic negotiation.

Furthermore, it does not appear practical to provide for notification in terms limited to issues of serious concern, e.g., when the case involves a substantial defense of comity or foreign law, or a substantial impact upon foreign governmental interests or U.S. foreign relations. This will not normally be evident from pleadings; and when a serious problem arises, the parties and foreign governments are aware of it and can bring it to the attention of the Justice and State Departments, as they have in the past. Thus, while it would be theoretically possible to enact legislation requiring courts to notify the government of the cases which give rise to concern, such a statute would appear to impose a burden on the courts without contributing significantly to a solution of the perceived problem.

2. A statute could be adopted allowing *amicus* participation by the United States in private cases raising issues of jurisdiction over conduct and parties abroad and conflict with foreign governmental policy. Such legisla-

tion could be similar to 28 U.S.C. Section 2403(a), which allows intervention by the United States to the extent of presenting evidence where the constitutionality of a federal statute is brought into question. The degree of intervention allowed could either be as broad as that provided for by Section 2403(a) or limited to the filing of *amicus* briefs.

The argument against such legislation is principally that need for it has not been shown. There is no reason to anticipate that *amicus* participation, when sought by the United States, would not be granted by the federal courts. It has been suggested that a statute would encourage the Justice Department to overcome counter-pressures and to adopt a program of helping to shape the rules governing antitrust extraterritorial jurisdiction. But since the statute would have to be in general terms, leaving discretion in the government, it would not appear to be much of an advance.

3. A related suggestion has been for a statutory provision authorizing *amicus* participation by foreign governments. One purpose would be to avoid a repetition of the embarrassingly offensive treatment accorded foreign governments in the uranium litigation. The U.S. government responded to that incident with two extraordinary letters, writing the Seventh Circuit and the district court to assert the legitimacy of the foreign governments' interests and the propriety of their *amicus* participation.⁹ It is hard to believe that a statute is required to preclude recurrence of that extreme situation. No statute has been needed to obtain *amicus* status for foreign governments when sought. Nevertheless, the uranium litigation has demonstrated to foreign governments that their views are likely to have only modest impact, unless endorsed, seconded, or presented by the U.S. executive branch. Even apart from the Seventh Circuit's offensive statement, the courts have not evidenced a willingness to credit foreign interests in the absence of an expression by the U.S. government.¹⁰ Accordingly, while foreign governments may appreciate assurance of an unencumbered opportunity to express their views, their emphasis is likely to be upon the desirability of, or the need for, Justice Department participation.

4. A more far-reaching proposal would be to couple the type of intervention extending as far as the presentation of evidence allowed by 28 U.S.C. Section 2403(a) with a right to obtain an expedited proceeding including direct expedited appeal to the Supreme Court on the extraterritoriality issues. These rights could be granted to the United States or foreign governments or both.

⁹Letter of Roberts B. Owen, Legal Adviser of the Department of State, to John H. Shenefield, Associate Attorney General (March 17, 1980), transmitted to the Court of Appeals by the Associate Attorney General at the Legal Adviser's request, reprinted in 74 AM. J. INT'L L. 665 (1980). Letter of John H. Shenefield, Associate Attorney General, to District Judge Prentice H. Marshall (May 6, 1980), reprinted in 5 Trade Reg. Rep. ¶ 50,416.

¹⁰In fact, in the uranium litigation itself, Judge Marshall inferred that the United States was content to see the matter litigated partially because of the absence of any U.S. government expression. *In re Uranium Antitrust Litigation*, Transcript of Dec. 17, 1980 Hearing, pp. 9-10.

Such a proposal has been offered as a solution to foreign concerns. A procedure for resolution of extraterritoriality issues at an early stage of a case can be highly desirable, particularly when substantial foreign governmental interests are involved. However, there are objections. Enactment of such procedures may complicate and delay private antitrust litigation. Nor is it clear that extraterritoriality issues can be separated and tried apart from the rest of a case. At the least, it has been argued, the balancing test for jurisdiction includes such elements as the extent of contacts with the various jurisdictions and the impact of relief, which it may not be possible to appraise in advance. Finally, a proposal to add another direct appeal to the Supreme Court's jurisdiction runs against the efforts in recent years which have successfully eliminated direct appeals of right in several fields, including antitrust.

5. A modest proposal would be for the United States government to adopt and to announce a policy of regularly appearing as *amicus* in cases which present substantial issues of the exercise of antitrust jurisdiction over conduct abroad and/or foreign entities, and in which there are significant conflicting foreign interests. The purpose of such appearances would be to urge the use of a balancing process which gives due weight to foreign interests in reaching a decision to exercise U.S. antitrust jurisdiction. In appropriate cases, the United States should be prepared to go further and to take a position on the application of these principles to the facts in the particular case. The commitment to an explicit policy should help overcome the Justice Department's traditional reluctance to participate *amicus*. The implementation of the commitment would aim at helping the courts formulate a doctrine of jurisdiction in cases involving extraterritoriality issues that is coherent, consistent and has sensible limits.

This proposal could be accomplished without new legislation. The policy could be announced, e.g., by joint statement of the Attorney General and the Secretary of State, or perhaps the Assistant Attorney General for Antitrust and the Legal Adviser. This statement could invite foreign governments and parties to bring appropriate cases to the attention of the Departments and would provide assurance to foreign governments that their views will be considered. (It would also have the effect of encouraging courts to solicit the U.S. government's views.) The Departments can seek to obtain the explicit endorsements of the relevant congressional committees for the policy, which would tend to reinforce it as a continuing policy.

There are arguments against adoption of such a policy. First, it might be said that there are sometimes sound reasons for the government not to appear in private antitrust cases, which explain why it has not generally been done, and thus argues against a commitment to do so in all cases involving substantial extraterritoriality issues. Second, the U.S. government interest in the legal principles or in foreign relations effects will vary. Third, the resources diverted to carry out this commitment are uncertain and unpredictable. We do not know how many cases there will be, so that

announcement of a policy may result in a serious drain on governmental resources. Fourth, antitrust cases are not the only situations raising extraterritoriality and foreign policy issues, and any policy of *amicus* intervention would have to apply to a broad range of cases and issues. These factors figured in the State Department's recent response to a foreign government request, declining to provide any assurance or undertaking that the Department would advise U.S. courts of its position on foreign relations and comity issues in cases which the foreign government identified as involving its significant interests. In the Department's view, such *amicus* participation has to be considered on a case-by-case basis; and it evidently believes that with the exception of the Seventh Circuit's decision in the uranium litigation, the procedure for *amicus* filings by foreign governments has worked well.¹¹

These points are not without merit. However, in our view they are not sufficient to reject the proposed policy of *amicus* participation. In addition to factors already discussed, we note that the Antitrust Division has recently announced that it will intervene more frequently as *amicus* in what it regards as significant private antitrust cases, in the interests of a rational development of antitrust law.¹² This is consistent with the type of cases here under consideration. The practical burden of brief writing on extraterritorial antitrust issues will fall most heavily on the Antitrust Division, which has thus proclaimed itself capable of handling even more extensive *amicus* participation than is proposed here. There would also be residual discretion in the government in determining that a case presented substantial extraterritoriality issues.

Further, there are sound reasons why a policy statement of *amicus* participation should be addressed to, and at this stage limited to, antitrust cases raising such issues. This area has been a particularly exacerbating problem for foreign governments and parties, so that an effort to deal with it would seem to make sense. Most other conflicts have involved enforcement activities by government executive or regulatory bodies (e.g., antiboycott, other trading restrictions), not private litigation. It is for this reason that the extreme foreign reactions, as evidenced by the U.K. Protection of Trading Interests Act and similar proposals elsewhere, have focused upon countering the effect of antitrust damage litigation.

¹¹Response of the United States Department of State, dated Oct. 16, 1981 to the Embassy of Australia's Diplomatic Note No. 120 (April 7, 1981).

¹²See W. Baxter, *International Aspects of Antitrust Enforcement*, Remarks before House Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, Nov. 19, 1981, at 8-9; M. Cutler, *Some Antitrust Division Views on Vertical Restraints: Public Policy and Private Actions*, Remarks before the Twenty-First Annual Advanced Antitrust Seminar on Distribution and Marketing, Dec. 8, 1981 (committing the Antitrust Division to "systematic participation" in private cases at both the trial and appellate levels); see also J. Shenefield, *Extraterritoriality and Antitrust — New Variations on a Familiar Theme*, Remarks before the International Law Institute and the ABA International Law Section, Washington, D.C., Dec. 10, 1980 at 19.

Giving due weight to the opposing arguments, our view is that they are outweighed by the U.S. interest in the proper development of antitrust law in foreign commerce and by the value of foreign relations objectives. The government should undertake the responsibility of participating in a systematic way in private antitrust litigation raising substantial extraterritoriality issues to advance the adoption and implementation of rules which take due account of foreign interests.

D. Conclusion

The federal courts are currently groping toward a new doctrine of jurisdiction in cases involving extraterritoriality issues and conflicts with the laws and policies of other countries, particularly in the antitrust field. It would make sense for the Justice Department to participate in helping to shape that doctrine in accord with principles of international comity and reasonableness in exercise of jurisdiction, whether in the context of government or private antitrust litigation.

Of the various steps considered, it does not appear necessary or useful to provide for a system of notification to the federal government of private antitrust cases raising issues of extraterritoriality. There is no reason to expect that such issues, when significant, are not being brought to the attention of the government. A statute authorizing the United States government (or foreign governments) to intervene in such private litigation, including expedited appeal procedures, would raise practical and other objections.

The most feasible and desirable course of action would seem to be for the U.S. government to adopt formally an explicit policy of participation as *amicus* in private litigation involving issues of jurisdiction over conduct outside the U.S. and/or foreign parties, and of conflicting policies and interests of other nations. An active Justice Department role in these suits should be of substantial assistance to the federal courts in developing rules in this area. Adoption of this policy should also help alleviate the concerns of foreign governments over the consequences of private treble-damage litigation affecting their interests.

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